IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

State of Washington, Plaintiff, vs. Michele Anderson and Joseph McEnroe, Defendants.	No. 07-1-08717-2 SEA No. 07-1-08716-4 SEA **ORDER ON DEFENDANTS' MOTIONS TO STRIKE THE NOTICE OF SPECIAL SENTENCING PROCEEDING**

Two issues are presented for decision today by Defendants Anderson and McEnroe. First, Defendants contend that RCW 10.95.020 violates the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14, of the Washington State Constitution because the list of aggravating factors has been expanded to the point that the statute no longer narrowly defines a subclass of crimes that are particularly serious for which the death penalty is appropriate. Second, Defendants contend that they were denied due process because the King County Prosecutor failed to comply with the statutory requirements of RCW 10.95.040(1) when deciding whether to file written notice of a special sentencing proceeding.

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Taking the issues in the order presented, the Defendants acknowledge that RCW 10.95.020 as originally enacted has been held to pass constitutional muster. State v. Bartholomew I, 98 Wn.2d 173, 192, 654 P.2d 1170 (1982). They argue, however, that subsequent case law interpretation of the factors, and the addition of four additional statutory factors with subparts, have rendered the statute so broad in application that aggravating circumstances can be applied to nearly every premeditated murder. The Defendants' briefing contains a lengthy compilation of cases interpreting and applying the statutory aggravating factors. They maintain that the legislative expansion of the aggravating factors and the "very loose interpretation of the statute by the Washington courts" render the entire Washington death penalty statute unconstitutional because the aggravating factors no longer genuinely narrow the class of persons eligible for the death penalty. After considerable review, this Court is not persuaded by Defendants' argument.

At the outset, this Court recognizes that, in Washington State, only premeditated first degree murder is a death penalty eligible offense. In his reply brief on the second issue before this Court, Defendant McEnroe himself notes that "[u]nlike other states, the only crime that can even be considered as a potential capital prosecution is premeditated murder." Defendant McEnroe's Reply to State's Response to Motion to Strike Notice of Intent at Pages 3-4 (emphasis in original). In a footnote, McEnroe acknowledges that in some other states felony murder, all first degree murders, or intentional or knowing murders are eligible for the death penalty. Id. at 4, n. 1. Accordingly, in Washington State the death penalty is somewhat narrowly circumscribed by its limitation to only first degree premeditated murder.

The Defendants cite Arave v. Creech, 113 S.Ct. 1534, 507 U.S. 463, 123 L.Ed.2d 188 (1993) for the proposition that because the "aggravating circumstances in Washington can be

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applied to nearly every premeditated murder, [the statute] is constitutionally infirm." Defendant McEnroe's Motion to Strike at page 4. Although they maintain that they are not asserting a vagueness challenge, Arave v. Creech involved, in part, the defendant's contention that the aggravating circumstance that he exhibited "utter disregard for human life" was unconstitutionally vague. Ultimately, the United States Supreme Court held that the language was not unconstitutionally vague given the limiting construction placed upon the language by the Idaho Supreme Court in a prior case. The Court also noted that in Idaho the sentencer was the judge rather than a jury and the judge was presumed to know the law. Arave at 8.

The Arave Court acknowledged, however, that the inquiry did not end there. Instead the Court was required to determine whether the State's capital sentencing scheme genuinely narrowed the class of persons eligible for the death penalty. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave at 10. The Court held that although the question was "close," the limiting construction placed upon the "utter disregard" language satisfied the narrowing requirement. Arave at 10. In short, the Court answered the question of whether the capital sentencing scheme genuinely narrowed the class of persons eligible for the death penalty by reviewing whether the aggravating circumstance pertaining to the defendant himself was constitutionally infirm. The Court did not conduct a global review of all the aggravating factors set forth in the entire Idaho death penalty statute.

The only case that Defendants have cited in support of the proposition that they may assert a constitutional challenge based on the contention that aggravating factors not alleged against them do not perform an adequate narrowing function is United States v. Cheely, 36 F.3d 1439 (1994). In fact, the only portion of that case cited in support of the proposition is a

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footnote. In that case, however, both of the death penalty provisions found to be unconstitutional had been alleged against Cheely, so the proposition asserted by Defendants is not squarely supported by the case.

In summary, the aggravating factors alleged against Defendants Anderson and McEnroe have long been recognized as constitutional. The Defendants have failed to provide persuasive authority for the proposition that they may challenge the constitutionality of the entire Washington State death penalty statute based upon infirmities in aggravating factors that have not been alleged against them. Furthermore, even if this Court were to accept the argument and rule in favor of the Defendants, the remedy would be to strike the unconstitutional aggravating factors, rather than to strike the notice of special sentencing proceeding. RCW 10.95.900.

The second issue is the narrower of the two and does not appear to have been directly addressed in any appellate court opinion. It is important to note that RCW 10.95.040(1) is a unique statute. Neither the Federal Death Penalty Act nor any state death penalty statute appears to have a comparable provision. RCW 10.95.040(1) provides in pertinent part that the "prosecutor shall file written notice of special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

On December 28, 2007, when the King County Prosecutor announced the filing of aggravated first degree murder charges against the Defendants, the Prosecutor stated:

> As you know, the prosecuting attorney has 30 days from the date of arraignment to decide whether or not to file a notice declaring our intention to pursue the death penalty. During this period of time, we review the facts of the case, and consider any mitigating circumstances including any facts or issues that the defense may want to present.

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> Given the magnitude of this crime, I pledge to give this case serious consideration for application of our state's ultimate punishment. But that decision is for another day.

Ten months later, the Prosecutor issued a statement regarding his decision to seek the death penalty against both Defendants. He stated in pertinent part:

> The Prosecuting Attorney has the obligation in potential capital murder cases to consider all relevant information about the crime and to weigh that against any mitigating evidence favoring the charged defendants.
>
> The crime that is alleged in this case against both defendants is the premeditated murders of Wayne Anderson, age 60, Judy Anderson, 61, Scott Anderson, 32, Erica Mantle Anderson, 32, Olivia Anderson, 6, and Nathan Anderson, 3.
>
> Given the magnitude of these alleged crimes, the slaying of three generations of a family, and particularly the slaying of two young children, I find that there are not sufficient reasons to keep the death penalty from being considered by the juries that will ultimately hear these matters.
>
> The death penalty is this state's ultimate punishment and is to be reserved for our most serious crimes. I believe this is one of those crimes. The jury acting as the conscience of the community, should have all relevant information and all legal options before it in consideration of this case.

The Defendants contend that the Prosecutor failed to follow the directive of RCW 10.95.040(1) to consider only the mitigating factors in deciding whether to file the special sentencing notice. Instead, they contend that the prosecutor erroneously weighed the evidence in mitigation against the heinousness of the factual allegations underlying the charges, thereby, inappropriately commingling the seriousness of the offense with the assessment of the defendant's individual culpability. Defendants reason that the seriousness of the offense was already determined and established by virtue of the filing of the aggravating circumstances. Therefore, reconsideration of the heinousness of the offense is inconsistent with the statutory directive to determine whether "there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."

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The State counters by asserting that the plain language of RCW 10.95.040(1) provides that the prosecutor should consider any relevant information available when deciding whether to file the special sentencing notice. The prosecutor is not constrained to consider only evidence pertaining to mitigation. The State maintains that the prosecutor can consider the facts of the case itself and the strength of the available evidence in making the decision. To hold otherwise, the State argues, would lead to absurd results.

A great deal has been written about the death penalty over the past four decades and numerous cases have articulated basic principles central to death penalty jurisprudence. Two of these principles are that death penalty statutes must be narrowly circumscribed to target the worst of the worst crimes. Second, that the imposition of the death penalty should be reserved for individuals who are deemed to be the worst of the worst offenders. With this fundamental backdrop in mind, we must review how the Washington State death penalty statute addresses these core principles.

First, the Legislature has defined the worst of the worst crimes that are eligible for the death penalty in Washington State. If the facts alleged indicate that the defendant has committed the crime of first degree premeditated murder as defined in RCW 9A.32.030(1)(a), and one or more of the 14 aggravating circumstances set forth in RCW 10.95.020 are present, then the State may charge the defendant with aggravated first degree murder. Aggravated first degree murder is an offense eligible for the death penalty.

In most jurisdictions the filing of the aggravating factor or circumstance provides the defendant notice that the State will be seeking the death penalty. Also, in some jurisdictions, the adjudication of the aggravating circumstance is conducted in the sentencing phase of the proceeding rather than the guilt phase. State v. Bartholomew II, 101 Wn.2d 631, 635, 683

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P.2d 1079 (1984). In other words, if the defendant is convicted of the underlying murder, then proof of the aggravating circumstance that would elevate the crime to a death penalty eligible offense is presented at the sentencing phase.

Early drafts of Washington State's current death penalty statute were consistent with this approach. However, the version that was finally enacted incorporated proof of the aggravating factor in the guilt phase of the proceeding rather than reserving that determination to the sentencing phase. Our Supreme Court in State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1983) described the process as the jury being asked to decide whether the defendant was guilty of premeditated murder in the first degree and, if so, being asked to answer a special verdict regarding the existence of a statutory aggravating circumstance. The Court held that while the aggravating circumstance is determined in the same proceeding, conceptually the crime is premeditated murder in the first degree with aggravating circumstances rather than a new crime of aggravated first degree murder. The aggravating circumstance functions as an "aggravation of penalty" provision justifying the increased penalty. Kincaid at 312.

If the jury finds the defendant guilty of premeditated murder in the first degree and also finds aggravating circumstances exist, the special sentencing proceeding is conducted. At this proceeding, the jury is charged with answering the following question, "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" To return an affirmative answer to that question, the jury must be unanimous.

It is in this special sentencing proceeding that the jury addresses the second guiding principle – is this the worst of the worst offender deserving the ultimate punishment? RCW

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10.95.070 provides a non-exclusive list of the factors that the jury may consider in determining whether leniency is merited. They include the presence or absence of prior criminal history or activity, whether the crime was committed while the defendant was under the influence of extreme mental disturbance, whether the victim consented to the murder, whether the defendant was an accomplice to the murder committed by another but played a minor role, whether the defendant acted under duress or domination of another, whether the defendant's capacity to appreciate the wrongfulness of his conduct or conform his/her conduct to the requirements of the law was substantially impaired as a result of mental disease or defect, whether the age of the defendant at the time of the crime calls for leniency, and whether there is a likelihood that the defendant will pose a danger to others in the future. Evidence in mitigation of punishment is the focus of the proceeding. State v. Bartholomew II, 101 Wn.2d at 645 (1984).

Before a case arrives at the sentencing stage of the proceeding, however – indeed, before even the guilt phase – Washington State has a unique intermediate determination set forth in RCW 10.95.040(1). As described above, this provision states that after the prosecutor has filed the death penalty eligible charge of aggravated murder in the first degree, the prosecutor has 30 days to decide whether to file the notice of special sentencing proceeding indicating that the State will pursue the death penalty rather than settling for the prospect of life without the possibility of parole. During this 30 day window, the defendant may not tender a plea of guilty to aggravated first degree murder nor may the Court accept such a plea or a plea to any other lesser included offense. This restriction is obviously intended to afford the State an opportunity to consider the propriety of filing a special sentencing notice without running the

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risk of the defendant pleading guilty in the meantime and precluding the prospect of receiving a death sentence.

Interestingly, although the statute allows for extension of the 30 day period for "good cause," the statute makes no provision for defense counsel's input or involvement during this review process. We are all aware that a culture and practice has evolved over the years that permit and encourage defense counsel to prepare and provide a "mitigation packet" to the prosecutor to assist in making this significant decision. We are also all aware that this practice has inexorably led to numerous agreed extensions of the 30 day period to afford counsel ample opportunity to investigate and prepare materials in mitigation for consideration. Defense counsel's agreement to the extension ostensibly is predicated on a desire to prepare the most compelling packet possible. The State's assent is presumably not only based upon a desire to obtain the most complete information possible to assist in the decision, but also a desire to curtail a later argument that defense counsel was ineffective.

Despite these current practical realities, when this Court is called upon to determine the meaning of RCW 10.95.040(1), the Court must consider the Washington State Death Penalty Act as it is written rather than construing it according to the practices that have evolved in various jurisdictions out of whole cloth.

In keeping with this principle, it is evident that the Legislature intended to afford a prosecutor only a narrow window in which to determine whether to file a notice of special sentencing proceeding once the prosecutor has elected to charge an individual with aggravated first degree murder. Absent a showing of good cause, the prosecutor is required to make the decision within 30 days of arraignment. Notably, the statute does not require the

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prosecutor to wait for any length of time either. In fact, the prosecutor may file the notice much earlier in the process.

In State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), the prosecutor expressed a desire to do just that. On May 20th, 1992, Pirtle was charged with 2 counts of aggravated first degree murder. On that same day, the prosecutor informed defense counsel that he intended to seek the death penalty. On appeal, Pirtle argued that the prosecutor abused his discretion by failing to consider mitigating evidence before deciding to seek the death penalty. The Supreme Court held that the prosecutor did not abuse his discretion in that instance because he had merely expressed a tentative decision and indicated to defense counsel that he would accept and consider mitigating evidence from the defense if provided before the 30 day expiration period for filing the notice of intent. On the 30th day, the prosecutor filed the notice of intent.

Although the case does not specifically indicate whether the defense submitted any evidence in mitigation, it appears that they did not. The Supreme Court held that the prosecutor's expressed willingness to consider evidence in mitigation indicated that the prosecutor was not applying an unconstitutionally rigid policy in making his decision. However, the Court implied that had the prosecutor announced his decision on May 20th and then refused to consider any additional evidence in mitigation, it "would indicate an unwillingness to engage in the individualized tempering" required. Pirtle at 642, citing In re Harris, 111 Wn.2d 691, 693, 763 P.2d 823 (1988), cert. denied, 490 U.S. 1075 (1989). The salient fact for the Pirtle Court was the willingness of the prosecutor to consider evidence in mitigation rather than subscribing to a rigid, inflexible policy of filing a notice of special sentencing in every aggravated first degree murder case.

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Having found that the prosecutor's expressed willingness to consider evidence in mitigation after his tentative announcement thwarted any argument that the prosecutor was employing an absolute policy that violated the constitutional requirement of individual tempering, the record itself still failed to illuminate the prosecutor's reasons for filing the notice of special sentencing. The reason for this deficiency is contained in RCW 10.95.040 itself. Pursuant to the statute, in order to file the notice of special sentencing the prosecutor need only have "reason to believe that there are not sufficient mitigating circumstances to merit leniency". The prosecutor need not articulate his reason or the underlying evidence in support. As Justice Utter lamented in a dissenting opinion over a decade earlier:

> If the prosecutor believes there is one reason to believe the mitigating circumstances are not sufficient, this is all that is required to put the question of capital punishment before the jury. The statute requires no reason to be stated for the record, nor any justification for requesting capital punishment. No affidavit filed with the court is required and we are absolutely unable to determine what the underlying reason is for allowing the jury to consider the imposition of the death penalty that distinguishes it from other aggravated murders.
>
> State v. Campbell, 103 Wn.2d 1, 47, 691 P.2d 929 (1984) (Utter, J., dissenting).

Undeterred by the absence of an explanation on the record, the Supreme Court filled the void in Pirtle by turning to evidence in the public record to glean possible justifications. Having done so, they stated:

> Even without input from the defense, the prosecutor had a substantial amount of information about Pirtle. Pirtle was born in Spokane and lived most of his life there. His contact with law enforcement officers had been extensive. He had ten juvenile convictions, including three for second degree burglary. He had five adult convictions including one for first degree theft and another for felony assault. Because of Pirtle's history, the prosecutor had some information about each of the statutory mitigating factors, with the possible exception of the Defendant's mental state at the time of the crime. Given what the prosecutor already knew and his willingness to wait thirty days to see if the defense could develop additional information, we find the prosecutor did not abuse his discretion.

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State v. Pirtle, 127 Wn.2d at 642-43.

Although Pirtle is viewed as an anomaly by the State, at least three relevant principles can be gleaned from the case. First, the prosecutor's duty under RCW 10.95.040(1) is not particularly onerous. The State need not conduct a deeply searching inquiry in order to satisfy its statutory obligation. This holding is consistent with the Court's prior holding in In re Harris, supra. In Harris the Court upheld a Pierce County Prosecuting Attorney's Office policy that required automatic filing of the notice of special sentencing unless the defendant or his counsel brought forth some evidence in mitigation for consideration. In re Harris, 111 Wn.2d at 691.

Secondly, Pirtle appears to indicate that although it may be a good practice to afford the defense an opportunity to submit mitigating evidence for consideration, there is no obligation to wait longer than the statutory 30 days for the information before rendering a decision to file the special sentencing notice.

Lastly, Pirtle indicates that while the court must be respectful of the discretion afforded the prosecutor in making a decision pursuant to RCW 10.95.040(1), the exercise of that discretion is not unfettered and is not immune from review by the court. That review, however, is conducted pursuant to a highly deferential abuse of discretion standard. Furthermore, even absent any expressed articulation by the prosecutor of the reason for believing the evidence in mitigation is insufficient, the Supreme Court will review public facts in the record on its own to determine if evidence exists that would support the prosecutor's determination.

Given the low burden imposed on the prosecutor in Pirtle to seek out mitigating evidence and given the highly deferential standard of review employed by the Supreme Court, this Court asked Ms. Ross at oral argument whether Pirtle was at all helpful to the defense

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position. Ms. Ross responded that although the Pirtle Court was highly deferential to the prosecutor, the telling part of the Court's analysis was reflected in the Court's self-expressed rationale in support of the prosecutor's decision. She noted that each of the factors relied upon by the Supreme Court was a factor specific to the defendant himself from his place of birth to his criminal record. She noted that the Court did not comment on the heinousness of the offense or the strength of the State's case in evaluating the mitigating factors. Accordingly, she contended that the actual analysis conducted by the Supreme Court itself validates the defense contention that the prosecutor should not weigh the facts of the underlying charge in making a special sentencing notice decision pursuant to RCW 10.95.040(1).

The State counters that the plain language of RCW 10.95.040(1) permits the prosecutor to consider any relevant information, not just potential mitigation. The State argues that simple logic and common sense dictate that a "reason to believe" that potential mitigation is insufficient to merit leniency must come from sources other than the potential mitigation itself. At oral argument, the State noted that it is their office policy to "only give the jurors the option of imposing death in cases where guilt is not even remotely a question." Accordingly, the facts of the crime alleged and the strength of the evidence available is an essential component of the calculus. To illustrate its point, the State poses the following two hypotheticals:

> Based on the reading of the statute that the defendants propose, a prosecutor *would* seek the death penalty in a case where the available evidence proving premeditation, the defendant's identity, or some other necessary element is not especially strong, yet mitigation evidence is negligible. By the same token, that same prosecutor *would not* seek the death penalty in another case where the evidence of guilt is overwhelming, the defendant's criminal history is lengthy, the crime is undeniably heinous, yet the defendant succeeds in presenting a compelling mitigation packet. In other words, the most deserving of death would be spared by the prosecutor's initial decision, while marginal cases would proceed to verdict. For obvious reasons, this simply cannot be the law.

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State's Response to Defendant's Motion to Strike Notice of Intent at Page 8, n. 2 (emphasis in the original).

Contrary to the State's assertion, these two hypotheticals do not illustrate the inherent absurdity of the defense position. In fact, they appear to support the defense contention. In the first example above, presumably at the time of filing, the State made an initial assessment that it could prove a charge of aggravated murder in the first degree. If it could not, then the charge would not have been filed. If RCW 10.95.040(1) is applied as written, the State must file the notice of special sentencing proceeding if the prosecutor has reason to believe that mitigating circumstances are insufficient to merit leniency. If the evidence of mitigation is non-existent, there is nothing inherently absurd or illogical in requiring the State to file the notice of special sentencing proceeding consistent with the direction of RCW 10.95.040(1). Conversely, in the second hypothetical, even if the aggravated murder in the first degree is exceptionally heinous, there is nothing inherently illogical or absurd in declining to file a notice of special sentencing proceeding if the evidence in mitigation is compelling.

Application of two additional hypotheticals illustrates the flaw in the State's logic and the danger arising from its application. In the State's first hypothetical, the State declines to file the notice of special sentencing not because the defendant presents compelling mitigation; in fact, in that hypothetical the defendant presents no mitigation. Rather, the State declines to file the notice because the State's case is weak. Consider this situation with the following addition. After the prosecutor decides not to file notice of special sentencing proceeding and allows the deadline to pass, continued investigation yields new evidence and additional witnesses that shore up the State's case. The weak case is now strong, but the State has lost its opportunity

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to pursue the death penalty on an individual who perhaps is most deserving of the ultimate punishment.

Second, assume that an especially heinous aggravated murder in the first degree is committed and the proof is extraordinarily strong. However, the evidence presented in mitigation is "compelling" as the State suggests in its hypothetical. Is there anything inherently illogical or absurd in not filing a notice of special sentencing in such circumstances? What is the reason for believing that the evidence of mitigating circumstances is insufficient if indeed it is compelling?

While the State's construction of the statute renders it a useful case management tool, it conflates the concept of the heinousness of the crime with the individual culpability of the individual defendant. Evidence presented in mitigation is not intended to mitigate the heinousness of the offense. Nothing could. The crimes that give rise to a charge of aggravated murder in the first degree are by legislative fiat deemed to be the most heinous crimes. Proof of the crime and the aggravating circumstance are the subject and purpose of the guilt phase.

Mitigating circumstances according to Black's Law Dictionary, as quoted in State v. Bartholomew II, are those circumstances which "do not constitute a justification or excuse of the offense in question, but which in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." State v. Bartholomew II at 647, quoting Black's Law Dictionary, 903 (5th rev. ed. 1979).

As we sit here today, no amount of mitigation, however strong, irrefutable and compelling it may be, will mitigate the horror of the offenses committed on the members of the Anderson family. No amount of mitigation will lessen the loss or the hurt experienced by their

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loved ones. Mitigation instead focuses on the individual moral culpability of the individual defendant despite the acknowledged heinousness of the crime.

Over 40 years of death penalty jurisprudence has repeatedly reaffirmed the simple premise that in order to pass constitutional muster death penalty statutes must be crafted in such a way as to limit the applicability of the death penalty to the worst crime and the most morally culpable offender. Each discretionary decision made during the progress of the case must be "guided" so as to avoid the prospect of arbitrary and capricious application of the penalty. The fundamental questions, therefore, remain: (1) what is the function of RCW 10.95.040(1) in this scheme, and (2) what may the prosecutor consider in deciding whether there is reason to believe that the mitigating circumstances do not merit leniency in any given case?

Although there is a dearth of legislative history on RCW 10.95.040(1), our Supreme Court seems to have answered the first question on at least two occasions. In upholding the constitutionality of the discretion afforded prosecutors in RCW 10.95.040(1), the Supreme Court in State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984) stated that "the prosecutor's decision not to seek the death penalty, in a given case, eliminates only those cases in which juries could not have imposed the death penalty. We believe that this analysis accurately portrays the function prosecutorial discretion plays in our death penalty statute. This discretion is constitutional." Rupe at 700.

Later that same year, the Supreme Court echoed the same position in State v. Dictado, 102 Wn.2d 277, 687 P.2d 172 (1984). In upholding RCW 10.95.040(1) against an equal protection challenge, the Court stated that "[t]he prosecutor's discretion to seek or not seek the death penalty depends on an evaluation of the evidence of mitigating circumstances. This

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evaluation must determine if sufficient evidence exists to convince a jury beyond a reasonable doubt that there are not sufficient mitigating circumstances. See RCW 10.95.040(4)." State v. Dictado, at 297; see also State v. Campbell, 103 Wn.2d 1, 26, 691 P.2d 929 (1984).

The Dictado Court described the function of the prosecutor under RCW 10.95.040(1) as being similar to the exercise of discretion in the charging function. Although the prosecutor does not determine the sentence, the prosecutor does decide whether sufficient evidence exists to take the issue of mitigation to the jury. Dictado, at 297-98.

It is abundantly clear to this Court that our Supreme Court has held for over 25 years that RCW 10.95.040(1) is intended to winnow out cases that should not proceed to special sentencing because the jury would not be able to impose the death penalty at the conclusion of the hearing. It is in light of this function that we must review what factors and evidence the prosecutor may consider in making the decision whether or not to file the notice of special sentencing proceeding.

Although a list of statutory factors is given to the jury to consider at the special sentencing proceeding, the list is non-exclusive and the jury may consider any relevant factors. The State is entitled to present evidence to rebut mitigating evidence produced by the defendant. State v. Bartholomew II, 101 Wn.2d at 642-43. In fact, the jury may even be invited in the State's closing argument to view the crime through the eyes of the deceased child victim when deciding if the mitigating evidence is sufficient to merit leniency. State v. Rice, 110 Wn.2d 577, 606-07, 757 P.2d 889 (1988). In Rice, the Court stated that in the penalty phase the jury "weighs the nature of the criminal acts against any mitigating factors. The jury should be allowed to consider as part of the analysis, the crime's impact on the

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victims, and argument on that topic is proper to the extent that it is restricted to the circumstances of the crime." Rice at 607.

Nine years later, the Supreme Court further refined its articulation of the role of the jury in the sentencing phase in State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). The United States Supreme Court has classified state death penalty statutes as either "weighing" or "non-weighing." In "weighing" states, the death penalty may be imposed only where the specified aggravating factors outweigh all the mitigating evidence. In a "non-weighing" state, "the fact finder considers all the circumstances from both the guilt phase and penalty phase in deciding penalty. These circumstances relate to both the crime and the defendant." Brown at 615-16.

Relying in part on our Supreme Court's own repeated use of variations of the word "weigh" in reference to penalty phase deliberations, Defendant Cal Brown contended that the trial court erred in refusing his proposed penalty phase jury instructions. In sum, Brown's proposed instructions were predicated on the premise that Washington State's death penalty statute was a "weighing" statute rather than a "non-weighing" statute. Brown at 616.

Despite the Court's own reiteration of the words "weigh," "weighs," and "outweighs" in the context of sentencing phase jurisprudence, the Supreme Court stated that it was not "convinced" that Washington's statute is a "weighing" statute. Brown at 616. The Court quoted Williams v. Calderon, 52 F.3rd 1465 (9th Cir. 1995) cert. denied, 516 U.S. 1124 (1996), for the proposition that:

> [T]he Supreme Court's weighing/non-weighing distinction may involve both procedural and substantive components. Procedurally, is the sentence restricted to a "weighing" of aggravation against mitigation? Substantively, is the sentencer prevented from considering evidence in aggravation other than discrete, statutorily-defined factors? Our review of federal and state court decisions reveals that where both constraints are present, the regimes involved are uniformly treated as weighing; where neither is present, the regimes are uniformly treated as non-weighing . . .

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Brown at 617.

The Court then held that under our statute the jury "is not restricted to weighing aggravating factors against mitigating factors, but may consider all evidence presented during both the guilt and penalty phases. The jury may also consider non-statutory aggravating factors." Id. Furthermore, the Court specifically affirmed the trial court's rejection of Brown's Proposed Instruction P-12 which stated that the jury must "not weigh the crime, any of its elements, any aspect of it or any circumstance surrounding it against the mitigating evidence" and that the "sole focus" of the jury should be whether there were insufficient mitigating circumstances to merit leniency. Brown at 619. The Court held that Brown's proposed instruction was an erroneous statement of the law and that a "capital sentencer in a non-weighing state need not be instructed how to weigh any particular fact in the capital sentencing decision." Id. The Court stated that the trial court had correctly instructed the jury "to consider all the evidence from both the guilt and penalty phases, not just whether there were insufficient mitigating circumstances." Id.

If the function of RCW 10.95.040 is to ferret out cases in which the jury could not impose the death penalty after the special sentencing proceeding, then logically the prosecutor should be permitted to evaluate all the evidence and factors that may bear on the jury's decision. Accordingly, it would follow that the prosecutor can consider all of the relevant facts known at the time including the facts of the case itself. As the Court in Rice stated "the mere presence of mitigating factors does not require a jury to grant leniency, so long as it is convinced beyond a reasonable doubt that any mitigating factors are outweighed by the circumstances of the crime." Rice, 110 Wn.2d at 624. Even though Washington is not a

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"weighing" state, neither the sentencing jury nor the prosecutor by extrapolation is precluded from weighing any particular fact in the decision either to impose or to seek the death penalty.

Despite the case law and reasoning set forth above, Anderson and McEnroe argue that the prosecutor's evaluation of the mitigating circumstances under RCW 10.95.040(1) is more circumscribed than that employed by the jury at the special proceeding stage. In support of this argument they note that RCW 10.95.060(4) specifically charges the jury to "hav[e] in mind the crime of which the defendant has been found guilty" when deliberating on mitigation. They note that no similar language can be found in RCW 10.95.040(1). Accordingly, they assert that the absence of similar language is an indication that the legislature did not intend for the prosecutor to consider the facts or circumstances of the crime when deciding whether to file the notice of special sentencing proceeding and such consideration violates the statute. Although this argument has initial allure, it ultimately fails when the statutory scheme of RCW 10.95 is considered in its entirety.

RCW 10.95.030 is titled "Sentences for aggravated first degree murder." Subsection 2 of the statute states in pertinent part "[i]f, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death." RCW 10.95.030 itself provides no guidance as to the procedures to be employed during the special sentencing process. The statute directs you to RCW 10.95.050 for that information. Notably, the statute mandates a death sentence if the trier of fact finds "that there are not sufficient mitigating circumstances to merit leniency". The same language is found in RCW 10.95.040(1). The prosecuting attorney shall file notice of special sentencing proceeding "when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency".

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Although defense counsel correctly point out that RCW 10.95.060(4) expressly states that the jury shall retire to deliberate on the question "[h]aving in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency", the purpose of the statute is to set forth broad parameters for the manner in which the special sentencing proceeding shall be conducted before the jury. That proceeding, by definition, occurs after the defendant has been found guilty. The language quoted by the defense is simply the charge given to the jury at the conclusion of the evidence and argument at the special sentencing phase. In short, it is essentially a jury instruction that informs 12 lay person jurors of the question they must answer in that portion of the proceeding. The fact that similar charging language cannot be found in RCW 10.95.040(1) does not imply that the prosecutor cannot consider the circumstances or the facts of the crime. Unlike the jury, the prosecutor has the benefit of reading the entire statutory scheme and case law decisions when fulfilling the role of decision-maker under RCW 10.95.040(1). The jury, on the other hand, is only instructed on the law as provided by the court. Hence, the provision of explicit charging language in the statute.

Furthermore, as set forth earlier in this opinion, several Washington Supreme Court decisions have indicated that the prosecutor's role under RCW 10.95.040(1) is to ferret out cases in which the jury could not impose death following the special sentencing proceeding. It is presumed that the legislature is familiar with court opinions and failure to amend a statute is evidence that the legislature agrees with the prior opinions interpreting the statute. Friends of Snoqualmie Valley v. King Co. Review Board, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992). Accordingly, this Court is not persuaded that the difference between RCW 10.95.060(4) and

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RCW 10.95.040(1) connotes a legislative intent to circumscribe the information the prosecutor may consider in the manner argued by the defense.

In summary, this Court recognizes and acknowledges consistent with prior Supreme Court precedent that RCW 10.95.040(1) is a constitutional delegation of discretionary authority to the prosecuting attorney and that the discretion afforded is not unfettered. Dictado at 297; In re Harris at 693. Although the prosecuting attorney in this case "pledged" to give the case serious consideration for the death penalty due to the magnitude of the crime, there is no evidence that suggests that he prejudged the matter. Not only did he agree to consider any mitigating evidence the defense wished to present, he agreed to extend the notice period for months to afford the defense an opportunity to garner and present evidence in mitigation. Pirtle at 642.

The prosecutor's role in exercising the discretion conferred by RCW 10.95.040(1) is to determine if there is reason to believe that the mitigating circumstances are insufficient to merit leniency. The scope of the information appropriate for the prosecutor's review is as broad as that which may be considered by the jury. The statute does not preclude the prosecutor from considering the facts and circumstances of the crime, but rather requires the prosecutor to anticipate and, in essence, preview the case as it will look to the jury at trial and through the special sentencing proceeding.

Although mitigating evidence was presented by both defendants Anderson and McEnroe, the mere presence of mitigating factors does not require the jury to grant leniency nor require the prosecutor to forego filing the notice of special sentencing proceeding. See Rice at 624. The evidence and arguments presented by Defendants fail to demonstrate that the King County Prosecutor did not comply with the requirements of RCW 10.95.040(1).

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Accordingly, there is no basis for this Court to believe that the prosecutor abused his discretion, nor any reason for this Court to take the extraordinary step of reviewing the evidence in mitigation prepared and submitted for his review.

For the reasons set forth in this memorandum opinion, Defendants' motions to strike the notice of special sentencing proceeding are denied.

Done this 4TH day of June, 2010.

Judge JEFFREY M. RAMSDELL

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